

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: June 30, 2000

TO : Curtis A. Wells, Regional Director  
Region 15

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Titan Tire of Natchez 133-8200  
Natchez, Mississippi 530-4825-3300  
Cases 15-CA-15144, -15188 530-4825-9100  
750-2533

These cases were resubmitted for advice as to whether complaint should issue alleging that the Employer is an alter ego of a bankrupt predecessor entity and violated Section 8(a)(5) of the Act by terminating the employment of the entire bargaining unit after it purchased the assets of the predecessor entity.

### FACTS

Many of the facts of the instant cases are set out in our previous memorandum in Case 15-CA-15144, dated September 23, 1999. In brief, for many years prior to May 1997, United Steelworkers of America, Local 303L (the Union or the USWA) or its predecessor represented a unit of approximately 420 production and maintenance employees of a Natchez, Mississippi tire production plant owned by Fidelity Tire (Fidelity). On May 13, 1997, Fidelity filed a petition for Chapter 11 bankruptcy. The next day, Maurice Taylor, the Chairman and CEO of Titan Tire Corp., acquired a controlling interest in Fidelity and became Chairman, CEO, and President.<sup>1</sup> Fidelity, operating the plant as trustee in bankruptcy, laid off all unit employees by the end of May.

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<sup>1</sup> Taylor is also President and CEO of Titan International and Chairman and CEO of several of Titan International's subsidiaries, including Titan Tire of Natchez which Taylor has described in bankruptcy hearings as a shell corporation and "one and the same" with the other Titan entities. To simplify matters, we will refer hereinafter to any of the Titan companies as "Titan" or "the Employer."

Taylor sought to renegotiate the collective-bargaining agreement with the Union. When the Union would not agree to renegotiate, Fidelity filed a motion to reject the agreement with the bankruptcy court in June 1997.<sup>2</sup> After several hearings, as well as court-ordered negotiations which resulted in several areas of agreement, Judge Jolly ordered Fidelity to implement certain provisions of its final offer, certain provisions of the Union's final offer, and the agreed-upon provisions. In October 1997, after it filed its plan of reorganization, Fidelity recalled approximately 200 of the laid-off unit employees and resumed operation of the plant.

In April 1998,<sup>3</sup> Fidelity moved for authorization to sell all of its assets to Titan "free and clear of all liens." The Union opposed that motion. In May and early June, bankruptcy hearings were held on the motion to sell assets.

At the opening of the hearing on June 17, Fidelity announced that it intended to file a motion to assign to Titan, as part of the sale of assets, Fidelity's collective-bargaining agreement, as modified by the court.<sup>4</sup> When the Union's counsel inquired as to what Titan's position was with regard to hiring current employees, Fidelity's counsel responded that, if the motion to sell assets was approved, there would not be any employees. When the Union's counsel sought to clarify Fidelity's position further, the judge characterized it by stating that, "under [Fidelity's] original proposal, you were basically going to try to shuck that contract during the course of the sale; but now, during the course of the sale, that contract will go with the sale." Fidelity's counsel agreed with the judge's statement, but added, "I'm just not sure who is going to be working under that contract." In

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<sup>2</sup> This motion was referred to the United States District Court for the Southern District of Mississippi, where it was heard by circuit court judge Grady Jolly, sitting as a district court judge by designation.

<sup>3</sup> All dates hereinafter are in 1998 unless otherwise indicated.

<sup>4</sup> Prior to the hearing, the Union had voted to strike the plant's buyer upon the effectuation of a sale of assets if there was not a new collective-bargaining agreement between the buyer and the Union.

the June 17 hearing, Taylor stated that he alone made the decision to assign the amended contract, and he reiterated that Titan had not made any commitment to hire Fidelity's employees.

On August 24, the bankruptcy court granted the motion for the sale of Fidelity's assets to Titan, finding that the sale was "for a good value and to a good faith purchaser." In its decision, the bankruptcy court acknowledged the interrelationship of Fidelity and Titan, referring to the pre-petition period as "prior to Titan buying a controlling interest in [Fidelity]" and noting that, "[t]o no one's surprise, Taylor stated that the Purchaser was a mere shell, a holding company fully owned by Titan Investment Corporation, which is fully owned by Titan Tire, and that the seller and purchaser are thus affiliated companies."<sup>5</sup> The court found that there was no evidence that "destroys the Purchaser's good faith status," which would have required showing "misconduct, fraud, or collusion by the Purchaser during the negotiations which led to the Term Sheet;" the court similarly found that the objectors had not "shown any attempt by the purchaser to take 'grossly unfair advantage of other bidders.'" The court expressly concluded that there was nothing in the connection between Fidelity and Titan that precluded a good faith sale, relying, inter alia, on a First Circuit case in which the same bank was both seller and purchaser.<sup>6</sup> The court further concluded that "any reasonable objections that the Union has to the sale of assets can be satisfied by conditioning the sale of assets on the assumption by the Debtor of the CBA [collective-bargaining agreement] and the assignment of it to the Purchaser, as the CBA is presently modified or further modified by the District Court." There was no indication in the bankruptcy court's August 24 decision that the sale was intended to be "free and clear" pursuant to 11 U.S.C. 363(f).<sup>7</sup>

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<sup>5</sup> The decision also noted that the representative of the creditors' committee stated that Fidelity "is controlled by Titan and Mr. Taylor; the Debtor's business is essentially changed; and the debtor corporation really now is a - it's not even a subsidiary. I mean, it's just a division of Titan International . . ."

<sup>6</sup> Greylock Glen Corp. v. Community Savings Bank, 656 F.2d 1 (1st Cir. 1981).

<sup>7</sup> On June 24, 1999, the bankruptcy court's decision was affirmed by the United States District Court for the

Taylor continued to negotiate with the Union in an attempt to reach an agreement that would go into effect after Titan formally took over the plant's operation, but no agreement was reached. Throughout the entire period of bargaining, Taylor primarily sought concessions on wages, benefits, and work rules, while the Union emphasized its demand for guarantees that all of the laid-off employees would be recalled. Taylor was willing to agree to guarantee that as many as 200 Fidelity employees would be hired, but only if the parties could reach agreement on the other issues. Taylor stated that, if the Union gave him contract with the changes he wanted, he would shut down on a Friday and start up the following Monday.

On September 4, the date the sale was finalized, all employees were terminated and the plant was shut down. On or about September 6, Titan advertised in local newspapers that it was "looking to hire 300 employees."

On or about September 15, the Union stated that it was on strike against Titan and began picketing at the plant. Titan subsequently began operations using a contractor. In October the contractor employed 180-190 employees, of whom approximately 15 were former Fidelity employees who crossed the picket line.

In early November, the Employer told the Union that it was going to begin hiring employees, and that all applicants would be required to undertake pre-employment training. Substantially all of the contractor's employees were invited to the training, as were approximately 130 of Fidelity's former employees. The letters of invitation included a specific date and time for each employee/applicant to begin training in groups of 50-75. Approximately 65 of Fidelity's former employees who were terminated on September 4 did not receive invitations to attend training at that time.

At the first training session, to which approximately 75 individuals had been invited, 120-130 of the former Fidelity employees invited to a training session, as well as employees who were not invited to any session, appeared at the training facility en masse. The Union took the position that all of the former Fidelity employees should

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Southern District of Mississippi. The district court inexplicably stated in its opinion that the bankruptcy court had concluded that Fidelity was not controlled by Titan.

be guaranteed employment and treated alike, or none would comply with the Employer's training/application process. The protesters refused the Employer's demand that everyone not scheduled for training leave, and the training session was cancelled. For the stated reason that they did not attend the training sessions scheduled for later that day or the next day, none of the former Fidelity employees who disrupted the first training session were offered other training dates or employment.

On November 17, the bankruptcy court issued an order ostensibly granting the motion to assign to Titan the terms of the "collective-bargaining agreement" ordered by Judge Jolly. The court stated, however, that, "as noted in the objection of the USWA, there is no collective bargaining agreement between the USWA and the purchaser, any terms and conditions of the employment assigned to Titan-Natchez do not constitute a collective bargaining agreement between Titan-Natchez and the USWA, and there will be no collective bargaining agreement as such unless and until the Titan Natchez and the USWA voluntarily determine to enter into such an agreement."<sup>8</sup> In this order, the court stated that its earlier order on the sale of assets "authorized [Fidelity] to sell substantially all of its assets, free and clear of liens, claims and interests," without providing any explanation for this characterization.

On or about December 7, Titan hired approximately 140 employees, 16 of whom were former Fidelity employees.

On December 22, the Union filed the charge in Case 15-CA-15144, alleging that Titan violated Section 8(a)(5) of the Act by unilaterally changing terms and conditions of employment without having bargained in good faith with the Union as the representative of its bargaining unit employees.<sup>9</sup>

Titan claims that it reached a representative complement of 200 employees in January 1999, 15-20% of

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<sup>8</sup> The Union's objection appears to have been based on its wish to avoid being subject to the no-strike clause in its collective-bargaining agreement with Fidelity.

<sup>9</sup> The Region has determined that Titan has made certain unilateral changes in terms and conditions of employment which would be unlawful if the Union continued to be the employees' Section 9(a) representative after the sale. This issue has not been submitted for advice.

which were former Fidelity employees. The Employer has continued to meet with the Union, although it is not clear whether the Employer currently recognizes the Union as the exclusive representative of its employees. The Union continues to picket the plant and has not made an unconditional offer to return to work on behalf of the former Fidelity employees.

In our September 23, 1999 memorandum, we instructed the Region to complete an alter ego investigation, based on our conclusion that the evidence indicated that Titan is the alter ego of Fidelity, and we authorized the Region to issue a Section 8(a)(5) complaint if it found Titan to be the alter ego of Fidelity.

The Region's investigation yielded no additional evidence regarding the alter ego issue. Thus, nothing was adduced that calls into question the alter ego determination set forth in our September 23, 1999 memorandum. The Employer presented no additional evidence; instead it argues that collateral estoppel precludes the Board from finding alter ego status because the alter ego issue was litigated before the bankruptcy court and the court ruled, as a basis for its conclusion that the sale of assets was appropriate, that Titan and Fidelity were not alter egos.

#### **ACTION**

We conclude that the Region should issue complaint, absent settlement, alleging that Titan is the alter ego of Fidelity and violated Section 8(a)(5) of the Act by terminating the employment of the entire bargaining unit.<sup>10</sup>

Initially, we conclude, in agreement with the Region and pursuant to the analysis set forth in our September 23, 1999 memorandum, that Titan is the alter ego of debtor-in-possession Fidelity. Since Titan is the alter ego of Fidelity, it was obligated to recognize and bargain with the Union as the exclusive collective bargaining representative of its employees and to continue the terms and conditions of employment in place when it "purchased"

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<sup>10</sup> To the extent that the Employer has refused to recognize the Union as the exclusive representative of its current employees, the Region should include a complaint allegation of an unlawful withdrawal of recognition.

Fidelity.<sup>11</sup> Its unilateral changes in terms and conditions, by terminating the entire bargaining unit and reducing the compensation of the replacement employees, violated Section 8(a)(5) of the Act.<sup>12</sup>

It is axiomatic that an Employer commits an unlawful unilateral change in violation of Section 8(a)(5) of the Act when it terminates the employment of all employees in a unit or a job classification without bargaining in good faith with the union representing such employees,<sup>13</sup> in the absence an entrepreneurial decision involving a change in the scope and direction of the enterprise.<sup>14</sup> There has been no contention that the Employer changed the scope and direction of the enterprise; rather, the Employer expressly sought to substitute one group of employees with another to perform the same work at the same plant under the control of the same employer.<sup>15</sup> Therefore, we conclude that the

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<sup>11</sup> See, e.g., The Sobeck Corporation, 321 NLRB 259, 266 (1996), quoting NLRB v. Omnitest Inspection Services, 937 F.2d 112, 122 (3rd Cir. 1991); Watt Electric Co., 273 NLRB 655, 658 (1984), and cases cited therein.

<sup>12</sup> There is no Section 10(b) impediment to such a complaint, as the Union's December 22 charge alleges that Titan violated Section 8(a)(5) of the Act by unilaterally changing terms and conditions of employment without having bargained in good faith with the Union as the representative of its bargaining unit employees. In addition, Section 10(b) would not bar any complaint allegation of unlawful withdrawal of recognition, as such an allegation would be closely related to the unlawful termination allegation. Spentonbush/Red Star Cos., 319 NLRB 988, 995 (1995), enf. denied on other grounds 106 F.3d 484 (2d Cir. 1997).

<sup>13</sup> See, e.g., Perrysville Coal Company, 264 NLRB 380 (1982). See generally Torrington Industries, 307 NLRB 809, 809-812 (1992); Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964).

<sup>14</sup> See generally First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

<sup>15</sup> It makes no difference that the Employer may have contemplated that, ultimately, most of the employees in the terminated groups would be hired in the replacement group.

Employer violated Section 8(a)(5) of the Act by terminating the employment of the entire bargaining unit.<sup>16</sup>

These Section 8(a)(5) violations are not based on the Employer's breach of a collective-bargaining agreement. Thus, we conclude that the "collective-bargaining agreement" ordered by Judge Jolly was not, in fact, an "agreement" in effect on September 4. Instead, it was a set of court-ordered terms and conditions of employment. This is the clear import of the bankruptcy court's order, wherein the court stated that "there is no collective bargaining agreement between the USWA and the purchaser, any terms and conditions of the employment assigned to Titan-Natchez do not constitute a collective bargaining agreement between Titan-Natchez and the USWA, and there will be no collective bargaining agreement as such unless and until the Titan Natchez and the USWA voluntarily determine to enter into such an agreement." However, even in the absence of a collective-bargaining agreement, the Employer's unlawful conduct makes out a straightforward unilateral change violation under Section 8(a)(5).

#### Collateral Estoppel

We further conclude that nothing in the bankruptcy courts' decisions precludes the Board from proceeding on an alter ego complaint. The doctrine of collateral estoppel, or "issue preclusion," provides that "once an issue is actually and necessarily determined by a court of competent

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As of September, the Employer had unilaterally terminated the employment status of all unit employees.

<sup>16</sup> [FOIA Exemption 5

jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.”<sup>17</sup> Where collateral estoppel applies, it bars not only the decision-making court, but any other court, from reconsidering the same issue.<sup>18</sup> The Board and courts specifically have applied the doctrine of collateral estoppel to Board proceedings.<sup>19</sup>

It is well-established that three elements must be satisfied in order for collateral estoppel to apply:

(1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated [by the party against whom preclusion is asserted] in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.<sup>20</sup>

In the instant cases, the Employer argues that the bankruptcy court ruled that Titan was not an alter ego of Fidelity and that this ruling was a necessary predicate to its conclusion that the sale of assets was appropriate. This argument fails on two grounds. First, the bankruptcy

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<sup>17</sup> Montana v. United States, 440 U.S. 147, 153 (1979).

<sup>18</sup> U.S. v. Stauffer Chemical, 464 U.S. 165 (1984).

<sup>19</sup> See, e.g., NLRB v. Heyman, 541 F.2d 796 (9th Cir. 1976) (“An implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations”); Tri-County Roofing, 311 NLRB 1368, 1378 n. 11 (1993), enfd. 148 LRRM 2640 (3d Cir. 1995), cert. denied 516 U.S. 818 (1995) (ALJ gave collateral estoppel effect to facts determined by district court in RICO suit); Fayette Electrical Cooperative, 316 NLRB 1118, 1119 (1995) (Board assumed, arguendo, that its jurisdiction was subject to principle of collateral estoppel but found matter not estopped).

<sup>20</sup> Town of North Bonneville v. Callaway, 10 F.3d 1505, 1508 (9th Cir. 1993), quoting Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir. 1992).

court made no ruling that Titan was not an alter ego of Fidelity. Indeed, all of the relevant sections of the bankruptcy court's decision are consistent with a finding of alter ego status. Thus, the court acknowledged the interrelationship of Fidelity and Titan, referring to the pre-petition period as "prior to Titan buying a controlling interest in [Fidelity]" and noting that, "[t]o no one's surprise, Taylor stated that the Purchaser was a mere shell, a holding company fully owned by Titan Investment Corporation, which is fully owned by Titan Tire, and that the seller and purchaser are thus affiliated companies." The decision also noted that the representative of the creditors' committee stated that Fidelity "is controlled by Titan and Mr. Taylor; the Debtor's business is essentially changed; and the debtor corporation really now is a - it's not even a subsidiary. I mean, it's just a division of Titan International . . ." <sup>21</sup> Therefore, as a factual matter, the first prong of the collateral estoppel test is not met.

Second, even assuming, arguendo, that the court had ruled that Titan was not an alter ego of Fidelity, such a ruling would not preclude relitigation of the issue because it would not have been a critical and necessary part of the bankruptcy court's judgment. The bankruptcy court granted the motion for the sale of Fidelity's assets to Titan based on its conclusion that the sale was "for a good value and to a good faith purchaser." The court expressly concluded that there was nothing in the connection between Fidelity and Titan that precluded a good faith sale, relying, *inter alia*, on a First Circuit case in which the same bank was both seller and purchaser. <sup>22</sup> The court further concluded that bad faith would have been demonstrated only if there was a showing of "misconduct, fraud, or collusion by the Purchaser during the negotiations which led to the Term Sheet"; there was no such showing and the objectors had not "shown any attempt by the purchaser to take 'grossly unfair

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<sup>21</sup> In its opinion affirming the bankruptcy court's decision, the district court inexplicably stated that the bankruptcy court had concluded that Fidelity was not controlled by Titan. Given the lack of basis for this statement, as well as the non-dispositive nature of the issue, as discussed below, we conclude that the district court did not intend this passing comment as a substantive ruling as to alter ego status. Rather, it appears to have been harmless error.

<sup>22</sup> Greylock Glen Corp. v. Community Savings Bank, supra.

advantage of other bidders.'" None of these conclusions would be affected in any way by the presence or absence of alter ego status. Thus, the issue was not a critical and necessary part of the bankruptcy court's judgment and there is no issue preclusion as to alter ego status.

#### "Free and Clear" Sale

Nor is the Board precluded from finding the Employer liable for terminating the entire bargaining unit based on the sale of assets having been authorized "free and clear of liens, claims and interests," pursuant to 11 U.S.C. 363(f).<sup>23</sup> The instant cases do not involve the only kind of claim that might be disallowed by a "free and clear" sale order, i.e., mere successor liability imposed on Titan for Fidelity's unlawful conduct, based solely on Titan's purchase of Fidelity's assets. Instead, the Employer would be held liable for the conduct of Titan officials,<sup>24</sup> acting on behalf of Titan, and acting solely in Titan's interest. This can be seen most clearly in that the termination of the entire bargaining unit appears to have occurred after the sale itself. Even if the termination technically occurred prior to the actual closing of the sale, however, only Titan had an interest in the employees' status after the sale. Thus, while the Employer clearly contemplated that the bargaining unit would continue under the Titan name after the sale and was in the midst of negotiations

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<sup>23</sup> Section 363(f) provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -- (1) applicable non-bankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

<sup>24</sup> As set forth in our previous advice memorandum, dated September 23, 1999, the management officials operating Fidelity as debtor-in-possession, including CEO Taylor and the plant manager, were Titan officials who remained on the Titan payroll.

with the Union for a collective-bargaining agreement covering a Titan unit,<sup>25</sup> Fidelity would have no assets after the sale and would cease to exist as an operating entity. Under such circumstances it is clear that the terminations were undertaken by and for Titan, and no order extinguishing liability for Fidelity's conduct would apply.

In any case, Fidelity's sale of assets was not authorized as a "free and clear" sale pursuant to 11 U.S.C. 363(f). Fidelity's motion to sell its assets sought only that the sale be authorized "free and clear of all liens," not the broader statutory language extinguishing "any interest" in the property. There was no indication in the bankruptcy court's August 24 decision, or in the district court's decision affirming it, that the sale was intended to be "free and clear" of all claims.<sup>26</sup> In sum, as any liability for the termination of the bargaining unit would not have been a "lien" addressed in the sale order, it could not have been affected by that order. We recognize that, in its November 17 order granting the motion to assign to Titan the "collective-bargaining agreement" ordered by Judge Jolly, the court stated that its earlier order on the sale of assets "authorized [Fidelity] to sell substantially all of its assets, free and clear of liens, claims and interests," without providing any explanation for this mischaracterization; this statement, however, does not appear to have been intended to change the nature of the previously authorized sale, or to have had that legal effect. Therefore, we conclude that the Board is not precluded from finding the Employer liable for terminating the entire bargaining unit based on a "free and clear" sale of assets pursuant to 11 U.S.C. 363(f), and we agree with

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<sup>25</sup> Significantly, Taylor had earlier stated that, if the Union gave him contract with the changes he wanted, he would shut down on a Friday and start up the following Monday.

<sup>26</sup> Indeed, the Term Sheet setting forth the particulars of the purchase clearly contemplates Titan's acceptance of Fidelity's liability, stating that "[t]he purchase price will be payable in full regardless of the condition of, claims to or liens against the assets . . ." and "[t]he Purchaser will have a continuing obligation to make payments for expenses of administration and other claims as may be allowed until the case is closed. The Purchaser will hold the estate harmless in connection with all environmental claims."

the Region that nothing in the bankruptcy courts' decisions precludes the Board from proceeding on such a complaint.

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Accordingly, the Region should issue complaint, absent settlement, alleging that Titan is the alter ego of Fidelity and violated Section 8(a)(5) of the Act by terminating the entire bargaining unit.<sup>34</sup>

B.J.K.

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<sup>34</sup> As noted above, to the extent that the Employer has refused to recognize the Union as the exclusive representative of its current employees, the Region should include a complaint allegation of an unlawful withdrawal of recognition.